IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

Supreme Court, U.S.
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No. 74-940
COLORADO RIVER WATER CONSERVATION DISTRICT,
ET AL., Petitioners
v.
UNITED STATES OF AMERICA, Respondent

No. 74-949
MARY AKIN, ET AL., Petitioners
v.
UNITED STATES OF AMERICA, Respondent

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS

STATE OF ARIZONA
Bruce Babbitt, Attorney General
159 State House
Phoenix, Arizona 85007

STATE OF CALIFORNIA
Evelle J. Younger, Attorney General
Fifth and Capitol Mall
Sacramento, California 90012

STATE OF IDAHO
Wayne L. Kidwell, Attorney General
State Capitol
Boise, Idaho 83720

STATE OF KANSAS
Curt T. Schneider, Attorney General
State House
Topeka, Kansas 66612

STATE OF MONTANA
Robert L. Woodahl, Attorney General
State Capitol
Helena, Montana 59601

STATE OF NEBRASKA
Paul L. Douglas, Attorney General
State Capitol
Lincoln, Nebraska 68509

STATE OF NEVADA
Robert List, Attorney General
Supreme Court Building
Carson City, Nevada 89701

STATE OF NEW MEXICO
Antonio Anaya, Attorney General
Supreme Court Building
Santa Fe, New Mexico 87501

STATE OF NORTH DAKOTA
Allen I. Olson, Attorney General
State Capitol
Bismarck, North Dakota 58501

STATE OF OKLAHOMA
Larry Derryberry, Attorney General
112 State Capitol
Oklahoma City, Oklahoma 73105

STATE OF OREGON
R. Lee Johnson, Attorney General
100 State Office Building
Salem, Oregon 97310

STATE OF SOUTH DAKOTA
William J. Janklow, Attorney General
State Capitol
Pierre, South Dakota 57501

STATE OF TEXAS
John L. Hill, Attorney General
Supreme Court Building
Austin, Texas 78711

STATE OF UTAH
Vernon B. Romney, Attorney General
State Capitol
Salt Lake City, Utah 84114

STATE OF WASHINGTON
Slade Gordon, Attorney General
Temple of Justice
Olympia, Washington 98504

STATE OF WYOMING
V. Frank Mendicino, Attorney General
State Capitol
Cheyenne, Wyoming 82001

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INDEX

	Page
I. INTEREST OF AMICI CURIAE	1
II. JURISDICTION	2
III. QUESTION PRESENTED	2
IV. STATUTORY PROVISIONS INVOLVED	2
V. SUMMARY OF ARGUMENT	4
VI. ARGUMENT	4
A. RESPECT FOR THE HISTORIC FUNCTIONS OF STATES IN WATER RIGHT DETERMINATION AND ADMINISTRATION NECESSITATES THE APPLICATION OF THE DOCTRINE OF COMITY TO DISMISS THE FEDERAL GOVERNMENT'S ACTION	4
B. FEDERALISM WILL BE PROMOTED BY THE EXERCISE OF ABSTENTION TO DISMISS THIS COMPLAINT	9
CONCLUSION	15

CASES

Alabama Public Service Commission v. Southern Railway Co., 341 U.S. 341 (1951)	12
Allegheny Airlines, Inc. v. Pennsylvania Public Utilities Commission, 465 F.2d 237 (3rd Cir. 1972) *cert. denied*, 410 U.S. 943 (1973)	12
Arizona v. California, 373 U.S. 546 (1963)	7
Avondale Irrigation District v. North Idaho Properties, Inc., 96 Idaho 1, 523 P.2d 818 (1974)	13
Burford v. Sun Oil Co., 319 U.S. 315 (1943)	10

Dresser Industries, Inc. v. Insurance Co. of No. America, 358 F.Supp 327, 329 (N.D. Tex. 1973), aff'd mem. 475 F.2d 1402 (5th Cir. 1973) 5

El Paso & R. I. Ry. Co. v. District Court, 36 N. M. 94, 8 P.2d 1064 (1932) 10

Harrison v. N.A.A.C.P., 360 U.S. 167, 176, 177 (1959) 10

Hicks v. Miranda, 422 U.S. ___, 43 U.S.L.W. 4857, 4863 (1975) 9

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) 6

In re Green River Drainage Area, 147 F.Supp. 127 (D. Utah 1956) 7

Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593, 594 (1968) 12

Lousiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 29 (1958) 14

Mimbres Valley Irrigation Co. v. Salopek, et al, State of New Mexico ex rel. Reynolds v. Abraham et al, Luna County District Court, No. 6326 13

Pacific Live Stock Co. v. Oregon Water Board, 241 U.S. 440 (1916) 12

Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941) 9, 10

Railroad Commission of Texas v. Rowan and Nichols Oil Co., 311 U.S. 570 (1941) 12

Reetz v. Bozanich, 397 U.S. 82 (1970) 12

State of New Mexico ex rel. Reynolds v. Hagerman Canal Co. et al., Chaves County District Court, Nos. 20234, 22600 13

Union Water Supply Corp. of Garciasville v. Vaughn, 355 F.Supp. 211 (S.D. Tex. 1972), aff'd per curiam 474 F.2d 1396 (5th Cir. 1973) 12

United States v. District Court in and for the County of Eagle, 401 U.S. 520 (1971) 4, 8, 9, 13

United States v. District Court in and for Water Div. No. 5, 401 U.S. 527 (1971) 4, 8, 9, 13

Younger v. Harris, 401 U.S. 37, 44 (1971) 5

FEDERAL STATUTES

28 U.S.C. § 1254(1) 2

43 U.S.C. §666, 66 Stat. 560 2

STATE STATUTES

Colorado Water Right Determination and Administration Act C.R.S. 1973, 37-92-101, et seq., as amended 3

OTHER AUTHORITY

C. Wright, *Law of Federal Courts*, § 52 (1970) 5

Bezanson, "Abstention: The Supreme Court and Allocation of Judicial Power," 27. *Vand. L. Rev.* 1106, 1127 (1974) 11

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BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS

I. INTEREST OF AMICI CURIAE

The States named herein as amici curiae fear the disruption of their respective systems for the determination and administration of water rights as a result of the decision of the court of appeals in this case. Unless the pragmatic and sagacious decision of the district court to abstain is reinstituted, the historically proven special capabilities of the water rights systems of amici curiae may also be undermined by the interference of a separate and potentially antagonistic federal process. The cardinal importance of water in the arid and semi-arid western states compels amici curiae to urge this Court to reject the injudicious opinion of the court below and thus preserve the proven effectiveness of the unitary state systems.

Amici curiae also appear to request this Court to recognize the appropriateness of comity and abstention to this case, and thereby sustain these essential doctrines of a workable federalism.[1]

II. JURISDICTION

The judgment of the United States Court of Appeals for the 10th Circuit was entered on October 2, 1974. On November 12, 1974, a timely Petition for Rehearing and Suggestion for Rehearing *en banc* was denied. Petitions for Writ of Certiorari were filed on January 30, 1975 and February 1, 1975, and were granted on April 28, 1975. This Court's jurisdiction is invoked pursuant to 28 U. S. C. §1254(1).

III. QUESTION PRESENTED

Should a federal district court defer on the basis of comity and abstention to a competent state forum for the resolution of federal water rights claims which are capable of complete determination and administration in the state system?

IV. STATUTORY PROVISIONS INVOLVED

43 U. S. C. §666, 66 Stat. 560, commonly referred to as the McCarran Amendment, reads as follows:

> §666. *Suits for the adjudication of water rights–Joinder of the United States as defendant; costs*
>
> (a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such

[1] Since the reserved water rights theory has no application in the State of Texas, it joins this brief for the sole purpose of upholding the doctrines of abstention and comity.

> rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit.
>
> *Service of Summons*
>
> (b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.
>
> *Joinder in suits involving use of interstate streams by State*
>
> (c) Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream. July 10, 1952, c. 651, Title II, §208 (a)-(c), 66 Stat. 560.

Also involved is the Colorado Water Right Determination and Administration Act of 1969, Colorado Revised Statutes 1973, 37-92-101, *et seq.*, as amended, and to the extent of the amici curiae's interest, the water right de-

termination and administration statutes of each of the individual states are relevant.

V. SUMMARY OF ARGUMENT

The determination and administration of water rights, including federal water rights, has been a well-performed, historical function of the states. Comity requires that the federal government respect the rightful independence of such state functions. Unless the complaint of the United States is dismissed, the federal court will be needlessly interfering with the established integrity and utility of a state regulatory scheme.

Abstention is a judicial tool by which federalism may be enhanced. In this case the district court, taking a pragmatic approach, sought to advance federalism and repair the parties to an on-going state proceeding. The district court wisely avoided piecemeal, duplicative and potentially chaotic adjudication and administration of the use of a natural resource of utmost state concern and involving established rights which are enmeshed in an effective and comprehensive state regulatory system. The declination of jurisdiction is consistent with the Congressional intent expressed in the McCarran Amendment and with the holdings of this Court in *United States* v. *District Court in and for the County of Eagle*, 401 U.S. 520 (1971) and *United States* v. *District Court in and for Water Division No. 5*, 401 U.S. 527 (1971). Abstention is clearly the proper course of action.

VI. ARGUMENT

A. RESPECT FOR THE HISTORIC FUNCTIONS OF STATES IN WATER RIGHT DETERMINATION AND ADMINISTRATION NECESSITATES THE APPLICATION OF THE DOCTRINE OF COMITY TO DISMISS THE FEDERAL GOVERNMENT'S ACTION.

Comity provides the ideal vehicle for transporting the water rights claims of the United States from a federal court to a state proceeding. The doctrine was well described as follows:

> "The word "comity" identifies the concept that federal courts, in the exercise of their jurisdiction, should give consideration to the sovereign status of the individual state. Commonly referred to as a "doctrine," comity is more a policy consideration than a rule of law. That policy consideration, however, underlies the rule established by the Supreme Court that federal courts should abstain to avoid needless conflict of federal jurisdiction with the administration by a state of its own affairs. *See* Wright, Federal Courts, § 52 (1970). A sound conception of our federal system requires a federal court to withhold intervention with state procedure in the interest of maintaining harmony within the system. State of California v. Oroville-Wyandotte Irr. Dist., 409 F.2d 532 (9th Cir. 1969)."
>
> *Dresser Industries, Inc. v. Insurance Co. of No. America*, 358 F.Supp. 327, 329 (1973), aff'd. mem., 475 F.2d 1402 (5th Cir. 1973).

Comity was vigorously asserted by Mr. Justice Black for the Court in *Younger* v. *Harris*, 401 U.S. 37, 44 (1971):

> " . . . the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in

their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism", and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.'"

Directly applicable to the instant case, wherein the United States seeks federal court jurisdiction because federal water claims are involved, is the statement from *Younger* (at 44) that:

> " . . . the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."

Both of these statements were given prominence in *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975) wherein the Court declared:

> "The seriousness of federal judicial interference with state civil functions has long been recognized by this Court." (at 602)
>
> ***
>
> "The component of Younger which rests upon the threat to our federal system is thus applicable to a civil proceeding such as this quite as much as it is to a criminal proceeding." (at 603)

While *Younger* presents an abstention doctrine parallel to that urged herein, it forcefully sets forth the identical considerations of comity which are a fundamental basis

upon which the federal complaint should be dismissed. The court of appeals not only showed no sensitivity to the legitimate interest of the state, as *Younger* instructs, but totally ignored the doctrine of comity, other than to recognize it as a basis for the district court's dismissal of the suit.

Colorado and amici curiae have developed individual water right determination and administration systems. Most of these have been designed and refined over decades of experience to meet the hydrological conditions, economic and social characteristics, and special concerns of each state. All of them reflect the longstanding concern of state government in the West with the fair and efficient regulation of rights to the use of water. Citizens, governmental units, and private enterprise have all relied upon the efficiency and integrity of these systems.

In contrast, the federal government has no system and, in fact, has wisely and commonly deferred to state law and state forums in most water right matters.

> "Congress has followed a consistent policy of adherence to state law with regard to the acquisition and administration of water rights by the federal government."
>
> *In re Green River Drainage Area,* 147 F.Supp. 127, 145 (D. Utah, 1956). See also the numerous supporting citations at 145-46.

While *Arizona* v. *California,* 373 U.S. 546 (1963), has subsequently recognized certain independent federal water rights, neither Congress nor the courts have departed from their long-standing recognition that state forums can competently adjudicate the "whole community of claims in-

volved" including reserved right claims and have continued the deference to state processes. *United States* v. *District Court in and for the County of Eagle,* 401 U.S. 520, 525 (1971); *United States* v. *District Court in and for Water Division No. 5.*, 401 U.S. 527 (1971).

Here, the United States may present its claims in the ongoing adjudicatory proceeding in Water Division 7, which already has jurisdiction over numerous federal claims for appropriative and reserved water rights in the geographic area. The Water Division 7 proceeding now includes the United States pursuant to joinder under the McCarran Amendment, 43 U. S. C. §666.[2] The joinder of the United States in a state water rights proceeding assures that all the relevant parties will be before the court and therefore the utility of the state function will be enhanced. The comprehensive and orderly determination of water rights in a common source of supply is integral to the entire fabric of life in the western states. In fact, the effectiveness of some of the water rights systems of amici curiae will be totally undermined if the United States can circumvent the McCarran Amendment by rushing its claims into federal court. Thus, by facilitating a complete, unitary water adjudication, the McCarran Amendment furthers comity.

Through the McCarran Amendment, which also authorizes the joinder of the federal government for the *administration* of water rights, Congress stated an intent that the state systems of water right determination and

[2] After being served under the McCarran Amendment, the United States filed its claims to waters in the Dolores River drainage within Water Division No. 7 in the state forum, but omitted all claims it had asserted in federal court. Claims to waters in the San Juan National Forest are divided between the state and federal courts, the exact type of piecemeal adjudication with potentially differing results, which should be avoided by abstention.

administration should be utilized for all aspects of federal water claims. Just a few years ago, this Court unanimously held that reserved right claims could be adequately abjudicated in a state forum. *United States* v. *District Court in and for the County of Eagle,* 401 U.S. 520 (1971); *United States* v. *District Court in and for Water Division No. 5,* 401 U.S. 527 (1971). By avoiding the adverse consequences of a bifurcated adjudicative and administrative process sought by the federal government in those suits, this Court implicitly recognized and advanced the policy of comity. The assumption of jurisdiction by the federal court would be a severe retrogression from *Eagle County* and *Water Division 5,* would encourage circumvention of the McCarran Amendment, and would debase the doctrine of comity.

Federal courts can best promote comity by deferring to the state water rights systems in cases such as the one at bar. Any other decision would "trivialize" the "principles of equity, comity, and federalism." *Hicks* v. *Miranda,* 422 U.S. _____, 43 U.S.L.W. 4857, 4863 (1975) (Burger, C. J., concurring).

B. FEDERALISM WILL BE PROMOTED BY THE EXERCISE OF ABSTENTION TO DISMISS THIS COMPLAINT.

State courts as well as federal courts properly engage in the adjudication and protection of federal claims. Abstention, a doctrine rooted in this cooperative judicial enterprise, allows a federal court to decline jurisdiction and send the parties to a state forum for resolution of their controversy. *Railroad Commission of Texas* v. *Pullman Co.,* 312 U.S. 496 (1941). The opinion of the court of appeals ignores the clearly analogous decisions of this

Court and vitiates the beneficial role of abstention in promoting federalism, judicial economy, and the efficient resolution of claims such as those advanced by the Government.

The "policy of comity inherent in the doctrine of abstention"[3] and the concern for the advancement of federalism permeate the decisions on abstention from this Court:

> "This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with the proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'scrupulous regard for the rightful independence of state governments should at all times actuate the federal courts,' *Matthews* v. *Rodgers*, 284 U.S. 521, 525 as their 'contribution . . . in furthering the harmonious relation between state and federal authority' . . . *Railroad Comm.* v. *Pullman Co.*, 312 U.S. 496, 501."
>
> *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 176 (1959).

To aid a district court in determining whether federalism will be promoted by deference to a state proceeding, numerous "models" have been set forth by the Supreme Court of the United States.

Of foremost applicability here, is the case of *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), wherein abstention was ordered by the Supreme Court on the basis of several

[3] *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 177 (1959).

interrelated factors: 1) the long standing interest and economic importance to the state of the natural resources at issue; 2) the efficiency and expertise of the state forum in dealing with a politically sensitive and technically difficult legal issue in contrast to the inexperience of the federal courts; and 3) avoidance of needless conflict between federal courts and a comprehensive state regulatory system. The Court concluded (at 334):

> "Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand."

The benefits of the *Burford*-type abstention are great. The federal courts are not burdened with duplicative, protracted and difficult litigation. The state is permitted to continue operation of its regulatory program without interference by the federal district court, and may first tackle the novel questions affecting it. The litigants receive the best forum without significant delay or inconvenience and any rights adjudicated are easily incorporated within the state administrative scheme. And, of paramount importance, federalism is respected and advanced by furthering a cooperative relationship between the sovereign state and the national government.[4]

Following the precedent of *Burford*, abstention has been prudently applied to situations remarkably similar to that presently before the Court. The subject matter of this litigation is water, a resource of immense importance and unique concern to Colorado and amici curiae. Where a natural resource is of such stature, the state forum should be given the primary opportunity to decide fundamental

[4] "*Burford* abstention, properly applied, seems to benefit everyone and prejudice the legitimate interests of no one." Bezanson, "Abstention: The Supreme Court and Allocation of Judicial Power,". 27. *Vand. L. Rev.* 1106, 1127 (1974).

questions integral to the use and regulation of that resource. *Railroad Commission of Texas* v. *Rowan and Nichols Oil Co.*, 311 U.S. 570 (1941). *Reetz* v. *Bozanich*, 397 U.S. 82 (1970). The appropriateness of abstention in cases involving the vital resource of water has previously been recognized by this Court.[5]

Colorado and amici curiae have all adopted sophisticated and comprehensive schemes for the determination and administration of water rights which have been relied upon by their citizens. Since water rights are interdependent, any rights of the United States will directly affect all the other rights which have been granted pursuant to state law in a common source of supply.[6]

Therefore, the federal claims are undeniably entangled in a scheme of state regulation. Solicitous forbearance from intrusion into the arena of the state regulatory scheme calls for the exercise of abstention. *Alabama Public Service Commission* v. *Southern Railroad Co.*, 341 U.S. 341 (1950); *Alleghany Airlines* v. *Pennsylvania Public Utilities*

[5] "The Court of Appeals erred in refusing to stay its hand. The state law issue which is crucial in this case is one of vital concern in the arid State of New Mexico, where water is one of the most valuable natural resources." *Kaiser Steel Corp.* v. *W.S. Ranch Co.*, 391 U.S. 593, 594 (1968). The concurring opinion of Mr. Justice Brennan, with whom Mr. Justice Douglas and Mr. Justice Marshall joined, also emphasizes this point. See also, *Union Water Supply Corp. of Garciasville* v. *Vaughn*, 355 F.Supp. 211 (S.D. Tex. 1972), aff'd per curium 474 F.2d 1396 (5th Cir. 1973).

[6] The *inter sese* nature of appropriative rights calls for a single, all-embracing process of determination and administration. The numerous practical, as well as technical problems, ingerent in a bifercated process, such as uncertainty of rights, relative powers of state and federal water administrators, and day-to-day stream management have been previously brought to the attention of the Court. The need for a unitary system which can deal with the "whole community of claims" is well recognized. *Pacific Live Stock Co.* v. *Oregon Water Board*, 241 U.S. 440 (1916); *El Paso & R. I. Ry. Co.* v. *District Court*, 36 N.M. 94, 8 P.2d 1064 (1932).

Commission, 465 F.2d 237 (3rd Cir. 1972) cert. denied, 410 U.S. 943 (1973).

State forums can competently determine all federal reserved rights. *United States* v. *District Court in and for the County of Eagle, State of Colorado*, et al., 401 U.S. 520 (1971); *United States* v. *District Court in and for Water Division No. 5, State of Colorado*, 401 U.S. 527 (1971). Pursuant to these decisions, the United States is adjudicating its reserved rights claims in Colorado's state courts in Water Divisions 4, 5, 6, and 7, and former Water Districts 36, 37, 51 and 52, and has adjudicated similar claims in state forums of various amici curiae. See, *Avondale Irrigation District* v. *North Idaho Properties, Inc.*, 96 Idaho 1, 523 P.2d 818 (1974).[7] The on-going proceeding in Colorado's Water Division 7 stands ready to adjudicate all the claims presented to the federal court in Denver as well as the federal claims already before it. The avoidance of piecemeal determination and potentially conflicting results and administration, concern for sound judicial management, and the existence of a pending state proceeding make abstention particularly appropriate.

[7] The United States is also presently adjudicating its water claims in New Mexico's state courts. *Mimbres Valley Irrigation Co.* v. *Salopek, et al., State of New Mexico ex rel. Reynolds* (Plaintiff in Intervention) v. *Abraham, et al.*, Luna County District Court, No. 6326 (Mimbres River Adjudication wherein the United States was joined under the McCarran Amendment); *State of New Mexico ex rel. Reynolds* v. *L. T. Louis, et al.*; *State of New Mexico ex rel. Reynolds* v. *Hagerman Canal Co., et al.* Chaves County District Court, Nos. 20294, 22600 (consolidated) (Adjudication of underground waters in the Roswell Basin, wherein the United States was joined under the McCarran Amendment. Similar suits have been adjudicated in the state courts in Washington.

As the Brief for the United States in Opposition to the Petitions for Certiorare states (at 9), New Mexico has instituted certain water rights suits involving federal claims in federal courts. Federal jurisdiction was invoked as a practical solution to avoid the time-consuming procedural litigation which would have ensued had the Government been joined under the McCarran Amendment to adjudicate its claims on behalf of Indians in state court. Expeditious adjudication was of paramount importance in order that the construction of major water resource projects not be delayed.

The opinion of the court of appeals reflects an overly technical analysis of abstention - one which appears sterile and detached when contrasted with the pragmatic reasoning of the district court. The viewpoint of ironclad federal jurisdiction adopted by the court of appeals in inappropriate when considering abstention, "a deeper policy derived from our federalism", *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25, 29 (1958). When so many of the circumstances which promote federalism exist, abstention should be exercised.

CONCLUSION

"Our Federalism", articulated in *Younger* v. *Harris*, is not a hollow phrase resigned to idealistic oration. Rather, it is a fundamental concept to be given vitality through the doctrines of comity and abstention. A host of material factors call for the advancement of "Our Federalism" by the dismissal of the federal court action and the concomitant utilization of the state forum. The capable water right determination and administration systems of the states should not be frustrated by the interference of the federal courts. This Court should reverse the court of appeals and reinstate the decision of the district court to abstain.

Respectfully submitted,

STATE OF ARIZONA
Bruce Babbitt, Attorney General
159 State House
Phoenix, Arizona 85007

STATE OF CALIFORNIA
Evelle J. Younger, Attorney General
Fifth and Capitol Mall
Sacramento, California 90012

STATE OF IDAHO
Wayne L. Kidwell, Attorney General
State Capitol
Boise, Idaho 83720

STATE OF KANSAS
Curt T. Schneider, Attorney General
State House
Topeka, Kansas 66612

STATE OF MONTANA
Robert L. Woodahl, Attorney General
State Capitol
Helena, Montana 59601

STATE OF NEBRASKA
Paul L. Douglas, Attorney General
State Capitol
Lincoln, Nebraska 68509

STATE OF NEVADA
Robert List, Attorney General
Supreme Court Building
Carson City, Nevada 89701

STATE OF NEW MEXICO
Antonio Anaya, Attorney General
Supreme Court Building
Santa Fe, New Mexico 87501

STATE OF NORTH DAKOTA
Allen I. Olson, Attorney General
State Capitol
Bismarck, North Dakota 58501

STATE OF OKLAHOMA
Larry Derryberry, Attorney General
112 State Capitol
Oklahoma City, Oklahoma 73105

STATE OF OREGON
R. Lee Johnson, Attorney General
100 State Office Building
Salem, Oregon 97310

STATE OF SOUTH DAKOTA
William J. Janklow, Attorney General
State Capitol
Pierre, South Dakota 57501

STATE OF TEXAS
John L. Hill, Attorney General
Supreme Court Building
Austin, Texas 78711

STATE OF UTAH
Vernon B. Romney, Attorney General
State Capitol
Salt Lake City, Utah 84114

STATE OF WASHINGTON
Slade Gordon, Attorney General
Temple of Justice
Olympia, Washington 98504

STATE OF WYOMING
V. Frank Mendicino, Attorney General
State Capitol
Cheyenne, Wyoming 82001